(1) No. _____

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PATERSON MUNICIPAL UTILITIES AUTHORITY,

Petitioner,

—v.—

HACKENSACK WATER COMPANY, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED

1. Can water rights in a non-navigable river be taken without compensation from a governmental body operating under a FERC license and which purchased the water rights and river bed pursuant to an enabling statute?

2. Is the New Jersey Water Supply Management Act, *N.J.S.A.* 58:1A-1 *et seq.*, unconstitutional as applied in taking and giving to others without compensation riparian rights which were purchased and exercised for over 200 years?

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No. ____

PATERSON MUNICIPAL UTILITIES AUTHORITY,

Petitioner,

—v.—

HACKENSACK WATER COMPANY, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Petitioner Paterson Municipal Utilities Authority respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New Jersey Supreme Court which refused to recognize a claim for compensation due to the taking of riparian rights by the state's allocation of those water rights to third parties.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court denying certification and dismissing the constitutional appeal was entered September 13, 1994. It is not yet reported in New Jersey Reports, and appears in the Appendix at 1a. The

unpublished written opinion of the New Jersey Superior Court, Appellate Division, appears in the Appendix at 2a. The unpublished written opinion of the New Jersey Superior Court, Law Division, appears in the Appendix at 7a.

JURISDICTION

The New Jersey Supreme Court denied the petition for certification and dismissed the constitutional appeal by Order entered September 13, 1994. The Order is set forth in the Appendix at 1a. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in the Appendix at 22a. The New Jersey Water Supply Management Act, *N.J.S.A.* 58:1A-1 *et seq.*, is set forth in relevant part in the Appendix at 23a.

STATEMENT OF THE CASE

This action was commenced by a Complaint in the Superior Court of New Jersey on July 26, 1990. The Complaint alleges that respondents Hackensack Water Company and North Jersey District Water Supply Commission damaged petitioner's rights to the flow of the Passaic River at the Great Falls by failing to compensate petitioner for their taking and infringement of private property and rights without just compensation. The Complaint also seeks damages for the detriment caused to a National Historic Landmark. In response to a Notice of Motion for Summary Judgment, the trial court by Opinion dated July 23, 1992, determined that these claims were without legal basis and entered judgment dismissing the Complaint.

On October 5, 1992, petitioner appealed to the Superior Court of New Jersey, Appellate Division. The court affirmed the dismissal of petitioner's causes of action, determining by opinion dated May 2, 1994, that "[t]he State's action in allocating portions of the Passaic River waters to others . . . cannot be characterized as a taking of property for which PMUA is entitled to be compensated." Appendix at 3a.

Petitioner appealed to the New Jersey Supreme Court on constitutional grounds and filed a petition for certification. The Court dismissed the constitutional appeal and denied the petition by Order entered September 13, 1994.

Petitioner Paterson Municipal Utilities Authority ("PMUA") acquired various rights, including land, water rights and the river bed itself, in and about the Great Falls in the Passaic River in Paterson, New Jersey.

PMUA's predecessor in title was the Society for Establishing Useful Manufactures ("S.U.M."), established by the New Jersey Legislature in November, 1791. This 1791 Act empowered S.U.M. to condemn and to establish canals and watercourses at and about the Passaic River. S.U.M. purchased lands (including the bed of the river) and water rights throughout what is now known as the Great Falls Historic District. S.U.M. also established a hydroelectric facility at Great Falls, which operates today pursuant to license of the Federal Energy Regulatory Commission ("FERC").

During the 1940's, the City of Paterson bought these properties from S.U.M. and succeeded to its rights. In turn, the City of Paterson operated the hydroelectric facility.

The City of Paterson deeded the properties to PMUA in 1982, which conveyance included the same rights received by the City from S.U.M., specifically including the water, water rights, and riparian rights. These riparian and other ownership rights have been exercised by S.U.M. and its successors for over 200 years.

PMUA's use of the waters of the river is without detriment to downstream owners—the water used for generating hydroelectricity is restored to the River without diminishing the flow of the river to those downstream.

Respondents North Jersey District Water Supply Commission ("NJDWSC") and Hackensack Water Company ("HWC")[1], formed a joint venture called the "Wanaque South Project" and were given permits by the New Jersey Department of Environmental Protection (now "NJDEPE") to divert water from the Passaic River at the Great Falls—upstream from the petitioner's lands and hydroelectric facility.[2]

Respondents take the water which they divert from the river and sell it for profit off-site. Respondents' uses are not without damage to downstream owners—that which they take and sell is not returned to the river, thereby diminishing the flow available to PMUA and others downstream.

In 1959, NJDWSC acknowledged its obligation to pay petitioner for taking these water rights and paid the City of Paterson for its diversions above the Great Falls. NJDWSC paid Paterson as PMUA's predecessor in interest $142,000.00 for the same type of taking as now, even though under a duly issued state permit, and received a deed to those water rights purchased.

In 1979, the City of Paterson and Passaic Valley Water Commission filed an appeal from the agency decision approving the Wanaque South Project. The court in *In Re North Jersey Dist. Water Supply Comm'n*, 175 N.J. Super. 167,

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[1] Hackensack Water Company is a subsidiary or affiliate of United Water Resources, a public company.

[2] The permits to defendants issued in 1982 provide for diversion of 3,875 million gallons during any month to each of NJDWSC and HWC from the Pompton and Passaic Rivers at Two Bridges and an additional 3,875 million gallons during any month to NJDWSC and 775 million gallons per month to HWC from the Ramapo River.

182–83 (App. Div. 1980), *cert. denied*, 85 N.J. 460 (1981), held in relevant part as follows:

> The questions dealing with Paterson's rights under its conveyance from the S.U.M. is premature since there is no showing, nor can there be, that the proposal as preplanned will violate any rights that Paterson has under the deed. Even if we accept Paterson's argument as correct, its remedy would be an action for damages . . . .
>
> * * * *
>
> If, as Paterson claims, the joint venture will affect its rights under the National Historic Landmark designation, Paterson will not be foreclosed from instituting an appropriate action for compensation or such other relief as may be appropriate.

The Appellate Division found the damage issues which are the basis of this litigation not ripe for determination in 1980, since respondents had not taken any water.

In 1986, PMUA sought to confirm its immunity from the state permit process when DEPE sought to require permitting for flash boards which were included in the FERC license. PMUA was successful in its action before the United States District Court for the District of New Jersey in confirming the federal preemption of its FERC license and there being no requirement for such a permit for the installation of flashboards.

The lower courts here determined that petitioner has no rights which entitle it to compensation. It was further determined that the State of New Jersey took all water rights in the state in the Water Supply Management Act ("WSMA"), *N.J.S.A.* 58:1A-1 *et seq.*, precluding a claim for compensation, despite the apparent contrary intention of *N.J.S.A.* 58:1A-12. *See* Appendix at 30a.[3]

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[3] In the courts below, petitioner argued that the taking of petitioner's rights without compensation was unconstitutional and that the

This case involves a public agency whose valuable property rights are being confiscated and/or substantially infringed by respondents under state permit—motivated by profit—and without payment for the damages caused by them. The lower courts' interpretations of the applicable law ignore the Fifth Amendment prohibition against taking property without compensation. The Supreme Court is needed to clarify the rights of riparian owners and enforce the law from prior decisions of this Court, particularly where non-riparian users have infringed the rights of other riparian owners and gained a windfall at their expense.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: This Petition presents an important issue of federal constitutional law which has not specifically been, but should be, settled by this Court and due to the state court having decided this question in a way that conflicts with applicable decisions of the Supreme Court.

This Court should take this opportunity to clarify its holdings in *Kaiser Aetna v. United States*, 444 U.S.164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), and *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), as applied to this matter. Specifically, this Court should grant certiorari here to explicitly rule that the taking of riparian rights through a state permit allocation process requires compensation to downstream owners with vested rights and, further, to resolve the contradiction of the lower court holdings with the preemption of petitioner's FERC license.

Water Supply Management Act, *N.J.S.A.* 58:1A-1 *et seq.*, is unconstitutional unless read to provide for compensation to petitioner for the infringement upon its rights. *See* Appendix at 13a, 15a, and 19a for excerpts of petitioner's briefs before each of the courts below. Thus, the same constitutional issues raised now were also raised below.

The law in New Jersey, as the New Jersey Water Supply Management Act, *N.J.S.A.* 58:1A-1 *et seq.*, was interpreted in this action, has eviscerated the right of a riparian owner to compensation for taking and has resulted in the confiscation of property rights without compensation in violation of the United States Constitution. This holding by the New Jersey Supreme Court requires review and guidance from the Supreme Court as being contrary to federal law. *See, e.g., Kaiser Aetna v. United States*, 444 U.S.164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *United States v. Kansas City Ins. Co.*, 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277 (1950).

The first and most significant error below is the conclusion that the taking of water for sale off-site by state permit does not entitle petitioner to compensation for infringement of its water rights. This error requires correction as flying in the face of longstanding federal constitutional law and basic riparian law.

The federal and state constitutions dictate that compensation claims be recognized by our courts. Even a minor but permanent physical occupation of an owner's property authorized by government constitutes an unlawful "taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886, 2893, 120 L.Ed.2d 798, 812 (1992). It is this first arm of regulatory takings discussed in *Lucas* which is at issue here.

When it comes to taking water, diversion upstream constitutes a physical invasion of no less a degree than if respondents actually stood on petitioner's property and took the water from the river. *Dugan v. Rank*, 372 U.S. 609, 625, 83 S.Ct. 999, 1009, 10 L.Ed.2d 15, 26-27 (1963). Similarly, where a non–navigable waterway is substantially improved

with governmental consent, a property owner has a "right to exclude" others from its waters, the infringement of which requires compensation. *Kaiser Aetna v. United States*, 444 U.S.164, 178-79, 100 S.Ct. 383, 392, 62 L.Ed.2d 332, 345-46 (1979). The courts below ignored these clear statements of law as applicable here.

The courts below failed to distinguish between the permit process and the water allocation issues addressed there, as opposed to the compensation issues not determined in that proceeding. *See State of North Carolina v. Hudson*, 665 F. Supp. 428, 447, *app. dec'd*, 731 F. Supp. 1261 (E.D.N.C. 1990), *aff'd*, 940 F.2d 58 (4th Cir. 1991), *cert. denied*, 117 L. Ed. 2d 411 (1992). NJDEPE as a matter of allocation determined to permit respondents to take water. It did not, nor could it, dictate that respondents could take the water without payment to affected parties.

The errors of the lower courts here are summed up by the following holding in *Hudson*:

> ". . . Interference with riparian rights is an actionable tort. *A municipal diversion of water for public water supply is not a riparian use, and if the diversion causes injury to downstream riparian owners, the injury may be redressed in a court of law*. . . .
>
> "Although riparian interests may be implicated by the pipeline project, any injuries from the diversion should be properly brought in a civil action for damages or injunctive relief. Issuance of the permit confers no property rights and would not alter the rights of property owners or the duties of [the city] pursuant to riparian doctrine. Riparian doctrine is simply not relevant to the permit application consideration." *State of North Carolina v. Hudson*, supra, 665 F. Supp. at 447-48 (citations omitted) (emphasis added).

In *In Re North Jersey Dist. Water Supply Comm'n*, 175 N.J. Super. 167 (App. Div. 1980), *cert. denied*, 85 N.J. 460 (1981), the Appellate Division determined that petitioner's claims were premature inasmuch as no water had then been taken. The more recent case of *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, ___ L.Ed.2d ___ (1994), reiterated that compensation is due if property rights are taken, even if taken in order to meet purportedly legitimate public interests. In this case, the lower courts have refused petitioner compensation even after the taking has occurred.

It is well established that a riparian owner has the legal right to make reasonable use of the passing flow for domestic, agricultural and other limited purposes on its land.[4] The instant case presents non-riparian users diverting substantial amounts of water solely for the off-site use of others, to the profit of respondents and to the significant detriment of petitioner's riparian rights and FERC license.

This is *not* a case of two riparian owners with equal rights. Respondents are not riparian proprietors at the Passaic River. Respondents use no land along the river except to pump water. Respondents are mere permittees—their entitlement as presented below was solely premised upon the issuance of two state allocation permits granting the right to divert particular amounts of water under conditions. Defendant HWC is not a public body and sells the water for profit to inure to its parent company and stockholders, not to the general public.

Respondents' permits were issued under the WSMA, which is an allocation-directed statute only. The purpose of the WSMA was to enable the State to "manage the water supply

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[4] The law has been unchanged for centuries now that "[e]very owner of land through which a stream of water flows is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion, or corruption. The right extends to the quality as well as to the quantity of the water." *Holsman v. Boiling Spring Bleaching Co.*, 14 N.J.Eq. 335, 342 (Ch. 1862).

by adopting a uniform water diversion permit system." *N.J.S.A.* 58:1A-2 (Appendix at 23a). Even the WSMA provides for compensating those whose rights are affected by the permit. *N.J.S.A.* 58:1A-12 (Appendix at 30a).[5]

Reading this legislative act constitutionally, there is only one conclusion: while the state has a substantial interest in monitoring and allocating the state's water supply and in adopting a system of permits to effectuate its interest, the state does not have the right to abridge prior existing and paid for rights without just compensation. If the WSMA declares state ownership of property previously purchased by others and permits the taking of property without compensation as presently held in this matter, the statute is unconstitutional as applied. The courts below refused to acknowledge these legal rights, which requires correction by this Court.

The error below was based in part on the conclusion that PMUA, as the successor in interest to the rights of S.U.M., had no special interest in the flow of the Passaic River. This defies longstanding case law to the contrary and general riparian doctrines.[6]

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[5] Respondent NJDWSC independently has the power of eminent domain. *N.J.S.A.* 58:5-16, -17. That NJDWSC Act provides for respondent to "acquire by . . . condemnation lands, . . . , water rights and all other property and rights needful for . . . the obtaining of any water supply." *N.J.S.A.* 58:5–16.

[6] *See Society for Establishing Useful Manufactures v. Low*, 17 N.J. Eq. 19, 26-27 (Ch. 1864) (S.U.M. "are the owners of the water and of the works at Paterson"); *Society for Establishing Useful Manufactures v. Morris Canal Bank Co.*, 1 N.J. Eq. 157, 186-87 (Ch. 1830) (S.U.M. appropriated the river and has right to take the whole of it provided it is restored to river bed for benefit of those below); *Between the Society for Establishing Useful Manufactures and The Morris Canal and Banking Co.*, 30 N.J. Eq. 145 fn. (1829) (The river at the great falls is private. "The right to the use of the waters of the Passaic, is legally vested in the society. . . .").

The court below erroneously concluded that PMUA has no greater rights than any other riparian owner. Aside from its status as successor to S.U.M., PMUA's FERC license provides that "[PMUA] shall retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, **water rights. . . .**" Although not recognized by the state courts in this action, it is well-established that this FERC license preempts the rights conferred by state permits. *California v. FERC*, 495 U.S. 490, 110 S.Ct. 2024, 109 L.Ed.2d 474 (1990); *Sayles Hydro Assoc. v. Maughan*, 985 F.2d 451 (9th Cir. 1992).

The lower courts in this matter determined that a riparian owner has no claim for damages due to the encroachment upon its water rights by the diminution in flow below a level from which petitioner had previously been generating power and otherwise using the river flow. It was also held below that PMUA, as a public body and successor to S.U.M., has no special rights to the natural flow of the non-navigable waters of the Passaic River, despite its having purchased the lands and even the river bed. The trial court also found that the WSMA confiscated all water rights and that even those who benefit from the reallocation of otherwise longstanding rights need not compensate those whose rights have been confiscated. If this decision is not corrected, the law of riparian rights, particularly in non-navigable waterways, will be turned inside out. The Supreme Court should grant the writ of certiorari on the grounds that the petition presents a question of general public importance which has not been explicitly addressed, but should be settled, by the Supreme Court and that the opinions of the lower courts conflict with applicable decisions of this Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the New Jersey Supreme Court in this matter.[7]

Respectfully submitted,

BRUCE J. ACKERMAN
STERN STEIGER CROLAND, P.A.
Attorneys for Petitioner
Paterson Municipal Utilities
Authority

[7] If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the New Jersey Supreme Court for redetermination in light of this Court's opinions in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), and *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), *supra*.

SUPREME COURT OF NEW JERSEY
C-53 September Term 1994
38,721

Filed September 13, 1994

PATERSON MUNICIPAL UTILITIES AUTHORITY, etc.,

Plaintiff-Petitioner,

—v.—

HACKENSACK WATER COMPANY, etc., *et al.*,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-487-92 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 8th day of September, 1994.

/s/ STEPHEN W. TOWNSEND
Clerk of the Supreme Court
of New Jersey

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-487-92T2

Filed May 2, 1994

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a public body,

Plaintiff-Appellant,

—v.—

HACKENSACK WATER COMPANY, a corporation, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION, a public body,

Defendants-Respondents.

Argued April 13, 1994—Decided May 2, 1994

Before:

Judges GAULKIN, R.S. COHEN and D'ANNUNZIO

On appeal from the Superior Court, Law Division, Passaic County.

Bruce J. Ackerman argued the cause for appellant (Stern, Steiger, Croland, Tanenbaum & Schielke, attorneys; Mr. Ackerman, Kenneth S. Goldrich and Joanne L. Graf, on the brief).

Marty M. Judge argued the cause for respondents (Drinker, Biddle & Reath, attorneys; Mr. Judge and Charles J. Vinicombe, on the brief).

David R. Patterson, Deputy Attorney General, argued the cause for *amicus curiae* State of New Jersey, Department of Environmental Protection and Energy (Deborah T. Poritz, Attorney General; Mary C. Jacobson, Assistant Attorney General, of counsel; Carol Grelecki, Deputy Attorney General, on the brief).

PER CURIAM

Substantially for the reasons expressed by Judge Alterman in his July 23, 1992 letter opinion, we concur in his conclusions that (1) neither the 1791 legislation creating the Society for Establishing Useful Manufactures (SUM) nor any succeeding statutory or decisional law directed "that the SUM's rights to the water running by the Great Falls were to be held without a diminution or alteration" and (2) plaintiff Paterson Municipal Utilities Authority (PMUA), as successor to SUM, "does not have greater rights than any other riparian owner to the waters of the Passaic River." The State's action in allocating portions of the Passaic River waters to others thus cannot be characterized as a taking of property for which PMUA is entitled to be compensated. *Johns-Manville Sales Corp. v. New Jersey Water Supply Auth.*, 211 *N.J.Super.* 315, 320-21 (App. Div. 1986).

Those holdings are dispositive of the appeal. PMUA stated its cause of action as one for a taking of its property without

compensation. PMUA did not, and does not, contend that the State's allocation of water is unreasonable; indeed, the challenge to that allocation by the City of Paterson, PMUA's predecessor in interest, was fully considered and finally rejected in *In re North Jersey District Water Supply Commission*, 175 *N.J.Super.* 167 (App. Div.), *certif. denied*, 85 *N.J.* 460 (1980). We therefore need not, and do not, pass on Judge Alterman's further conclusion that a water allocation made pursuant to the Water Supply Management Act, *N.J.S.A.* 58:1A-1 to 17, "is, as a matter of law, reasonable."

The judgment is affirmed.

/s/ ILLEGIBLE
Clerk

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: PASSAIC COUNTY

DOCKET NO. PAS-L-6702-90

Civil Action Filed August 31, 1992

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a Public Body,

Plaintiff,

—v.—

HACKENSACK WATER COMPANY, a Corporation, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION, a Public Body,

Defendants.

STRYKER, TAMS & DILL
Two Penn Plaza East
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Hackensack Water Company
and North Jersey District
Water Supply Commission

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS

THIS MATTER having been opened to the Court on application of the defendants, Hackensack Water Company and North Jersey District Water Supply Commission (by Stryker, Tams & Dill, attorneys for defendants [Marty M. Judge, Esq. appearing]), and in the presence of the plaintiff, Paterson Municipal Utilities Authority (by Stern, Steiger, Croland, Tanenbaum & Schielke [Bruce J. Ackerman, Esq. appearing]), for an order granting summary judgment to the defendants and seeking dismissal with prejudice of the Amended Complaint of the plaintiff; and the court having considered the papers submitted by all counsel and the arguments made by counsel; and for the reasons set forth in the Court's written opinion dated July 23, 1992; and for other good cause shown;

IT IS ON THIS 31 day of Aug. 1992;

ORDERED that the motion by the defendants, Hackensack Water Company and North Jersey District Water Supply Commission, for an order granting summary judgment to the defendants is hereby granted and the Amended Complaint of the plaintiff, Paterson Municipal Utilities Authority, is hereby dismissed, with prejudice.

/s/ HERBERT S. ALTERMAN, J.S.C.
Herbert S. Alterman, J.S.C.

PAPERS CONSIDERED:

Defendants' Notice of Motion ____

Defendants' Certification of Counsel and Attached Documents ____

Defendants' Memorandum of Law ____

Plaintiff's Opposing Papers ____

Defendants' Reply Papers ____

Other ____

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY

HERBERT S. ALTERMAN
JUDGE

COURTHOUSE
PATERSON, NEW JERSEY 07505

July 23, 1992

Stryker, Tams & Dill, Esqs.
Two Penn Plaza East
Newark, New Jersey 07105

Attention: Marty M. Judge, Esq.

Stern, Steiger, Croland, Tanenbaum & Schielke, Esqs.
One Mack Centre Drive
Mack Centre II
Paramus, New Jersey 07652

Attention: Bruce J. Ackerman, Esq.

Re: Paterson Municipal Utilities Authority vs. Hackensack Water Co., et als.
Docket No. L 6702-90

Gentlemen:

This is a motion for summary judgment.

Plaintiff, Paterson Municipal Utilities Authority, commenced this action against defendants, Hackensack Water Company and North Jersey District Water Supply Commission. Defendants are joint venturers in the Wanaque South Project. Plaintiff contends that it is the sole owner of riparian water rights at the Great Falls in Paterson, and that it has been damaged by defendants' upstream diversion of water from the Passaic, Pompton and Ramapo Rivers. I conclude there is no diversion giving rise to a cause of action for damages, and grant defendants' motion.

Plaintiff alleges that it is the successor in interest to the City of Paterson, which in turn, is the successor to the Society for Establishing Useful Manufacturers (hereinafter SUM). The SUM was established by the New Jersey legislature in November, 1791. *L.* 1971, *Pat.* 103, § 1, et seq. Plaintiff contends that the legislature, by this Act, granted the SUM the full use and benefit to the waters running by and through the Great Falls, which right was to be without "diminution or alteration."

Although the legislature empowered the SUM to purchase property, to cut canals and clear channels of rivers, and to collect tolls for the passage of vessles on any canals built or rivers rendered navigable by the SUM, it did not explicitly grant the SUM the exclusive right to the undiminished flow of the waters of the Great Falls. In *Society For Establishing Useful Manufacturers v. Morris Canal & Banking Company*, 30 *N.J. Eq*, 145, at p. 162 footnote, the court observed:

> ". . . And when the society acquired a title to the lands, they acquired a right to appropriate and use the waters for manufacturing purposes, without any special grant in their charter of a right to do so. . . ."

Moreover, the cases plaintiff cites to support its contention of an exclusive right, cannot be interpreted as a finding or conclusion by these courts that the legislature intended that the riparian rights acquired by the SUM are greater than the riparian rights of any other owner. These courts merely recognized that the SUM possessed the common law rights of a riparian owner. Thus, in *Society For Establishing Useful Manufacturers v. Morris Canal Co.*, 1 *N.J. Eq.* 157 (Ch. 1830), the Chancellor observed that the SUM had a right to take all the waters from the stream, provided it is restroed after being used, and provided that no one having prior rights is injured. "Such, I take to be the common law rights of the society, independent of any additional privileges that may be secured to them by their charter. What they may be, if any exists, it appears to me unnecessary now to inquire."

There is another reason to conclude that the cases cited by plaintiff do not support the proposition for which they are offered; viz., that the SUM's rights to the waters running by the Great Falls were to be held without a diminution or alteration. Those cases relied upon earlier English precedents that apply the "natural flow theory; i.e., that every proprietor "who claims a right, either to throw the water back upon the lands of his neighbor above, or to diminish the quantity of water which is usually descended to the proprietor below, must prove either a grant or license from such proprietor, or twenty years uninterrupted enjoyment."

Our Supreme Court has more recently adopted the American or "reasonable use" rule. *Armstrong v. Francis Corp.*, 20 *N.J.* 320 (1956). That rule allows each possessor to make reasonable use of his land, even though the flow of surface waters is thereby altered or causes some harm to others, but he occurs liability when his harmful interference with the flow of waters is unreasonable. *Id.* at p. 327. The "reasonable use" rule was applied in *Borough of Westville v. Whitney Home Builders*, 40 *N.J. Super* 62 (App.Div. 1956), an action seeking to enjoin a housing builder and town from discharging affluent from a sewerage disposal plant into a pond in a recreational park. After considering the history of the law governing the mutual rights and obligations of reparian owners, as well as examining the "natural flow" theory and the "reasonable use" doctrine, the court stated:

> "On principle, we conclude that the interests of a changing, complex and technologically mushrooming society call for the application of the "reasonable use" doctrine in this field; a rule which enables judicial arbitration, in the absence of controlling legislation, of the fair participation in common waters of those who have a right of property therein on the basis of what all of the attendant circumstances shows to be reasonable. On analysis of the case authorities, we think the courts have actually moved along that course, whatever the occa-

sional ideological conflict in expression. . . ." *Id.* at pp. 80-81.

Because plaintiff does not have greater rights than any other riparian owner to the waters of the Passaic River, it is not entitled to damages from defendants unless defendants have exercised their riparian rights unreasonably. And, although the determination of "reasonableness" is ordinarily a question of fact, it is, in the circumstances of this case, as issue of law.

On August 11, 1975, defendants filed applications with the Water Policy and Supply Council for a joint project, which became the Wanaque South Project. At that time, South Paterson owned a non-operating hydroelectric plant at the Great Falls, but was planning a new hydroelectric facility. The Council approved the project contingent upon compliance with the Historic Site Law insofar as the Great Falls was concerned.

The N.J.D.E.P. commissioner approved the grant of diversion permits to defendants and allowed encroachment on the Great Falls. He recognized the conflict between the need for an adequate water supply and the need to maintain the aesthetic value of the Great Falls, and accommodated each by the imposition of appropriate conditions to the permit. On appeal, the Appelllate Division affirmed the commissioners' determination. *In Re North Jersey District Water Supply Commission*, 175 *N.J. Super* 167 (App.Div. 1980).

In 1981, the legislature enacted the Water Supply Management Act. *N.J.S.A.* 58:1A-1, et seq.. In doing so, it found that the "water resources of the state are public assets of the state held in trust for its citizens", "that ownership of these assets is in the state", and the Act was necessary to insure adequate water supplies. *N.J.S.A.* 58:1A-2. On October 10, 1985, plaintiff obtained a permit from the N.J.D.E.P., under whose auspicies the Water Supply Management Act is administered, permitting it to divert water for the use of hydroelectric generation. The permit contains a provision:

"7. This permit shall not be construed as affecting in any way the validity of the diversion permits held by other permitees. This permit shall not govern any claim for damages resulting from any future depletion of the flow of the water of the Passaic River and its tributaries asserted by the applicant under claim of water rights acquired pursuant to State law."

The permits granted to defendants by the N.J.D.E.P. are renewals of earlier permits and antedate the permit received by plaintiff, Plaintiff's license issued by the Federal Energy Regulatory Commission in March 1981, expressly provides that plaintiff's water rights acquired pursuant to State law, not this license", shall govern any claim for damages made by plaintiff for damages resulting from the depletion of water flow.

Accordingly, since the N.J.D.E.P., through the Water Supply Management Act determined the appropriate allocation of the state's water resources to be allowed to the defendants, any use by defendants within this allocation is, as a matter of law, reasonable.

Plaintiff's claim for damages resulting from the impairment of the aesthetic value of the Great Falls is not based upon the Great Falls designation as an historic landmark, but rests upon defendants unlawful interference with undiminished water flow at the Great Falls. Because, for reasons previously stated, plaintiff is not entitled to an undiminished flow, it cannot maintain its cause of action for damages resulting to the aesthetic value of the Great Falls.

For these reasons, defendants' motion for summary judgment is granted. Defendants will please submit an appropriate form of judgment on five days' notice.

Thank you.

Very truly yours,

/s/ ROBERT S. ALTERMAN, J.S.C.

ROBERT S. ALTERMAN, J.S.C.

HSA:sdr

Filed June 7, 1994

SUPREME COURT OF NEW JERSEY
DOCKET NO. 38,721

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-487-92T2

CRIMINAL ACTION

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a Public Body,

Plaintiff,

—VS.—

HACKENSACK WATER COMPANY, a Corporation, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION, a Public Body,

Defendants.

ON PETITION FOR CERTIFICATION OF FINAL JUDGMENT OF NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

Sat Below:

Superior Court
Appellate Division
Judge Gaulkin, R.S. Cohen,
and D'Annunzio, JJ.A.D.

PETITION FOR CERTIFICATION AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER PATERSON MUNICIPAL UTILITIES AUTHORITY

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STATEMENT OF THE MATTER INVOLVED

This matter involves the summary dismissal of plaintiff's claim for damages for infringement of its riparian rights caused by the upstream diversions of water by defendants. Petition for Certification is sought as to:

(1) clarification of the rights of riparian owners under New Jersey law after *Armstrong v. Francis Corp.*, 20 N.J. 320 (1956), particularly where non-riparian users take water for sale off-site to the detriment of riparian owners;

(2) recognition of plaintiff's entitlement to payment under both the United States Constitution and the New Jersey Constitution for the taking of water rights, *U.S. Const.* Amendment 5, 14, *N.J.Const.* Art.1, ¶ 20, *N.J.S.A.* 58:1A-12, and *N.J.S.A.* 58:5-16;

(3) the unconstitutionality of the Water Supply Management Act ("WSMA"), *N.J.S.A.* 58:1A-1 *et seq.*, as

applied to the plaintiff in light of *L.* 1791, *Pat.* 104, and *N.J.S.A.* 58:5-16;

(4) recognition of a claim of unjust enrichment for the taking of water rights; and

(5) application of the doctrine of estoppel by deed to a deed of water rights.

Guidance is sought to resolve conflicts between the following lower court opinions rendered after *Armstrong*, *supra*: *In Re North Jersey Dist. Water Supply Comm'n*, 175 N.J. Super. 167 (App. Div. 1980), *cert. den.*, 85 N.J. 460 (1981) ("remedy would be an action for damages" after Paterson's water rights infringed pursuant to permit); *Borough of Westville v. Whitney Home Builders*, 40 * * *

QUESTIONS PRESENTED

1. Does the "reasonable use" doctrine expressed in *Armstrong v. Francis Corp.*, 20 N.J. 320 (1956), apply to the payment of damages where a non-riparian user takes water for sale off-site to the detriment of riparian owners?

2. Does the taking of water by permit give rise to a claim for the payment of damages as a result of an infringement upon plaintiff's riparian rights pursuant to *U.S. Const.* Amendment 5, 14, *N.J. Const.* Art.1, ¶ 20, *N.J.S.A.* 58:1A-12, and *N.J.S.A.* 58:5-16?

3. Is the interpretation given *Armstrong* by the Appellate Division consistent with a constitutional interpretation of the Water Supply Management Act ("WSMA"), *N.J.S.A.* 58:1A-1 *et seq.*, when read *in pari materia* with *L.* 1791, *Pat.* 104, and *N.J.S.A.* 58:5-16?

4. Does a claim of unjust enrichment lie against defendants for the encroachment and/or infringement upon plaintiff's water rights?

Filed January 22, 1993

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-487-92T2

Civil Action

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a Public Body,

Plaintiff,

—vs.—

HACKENSACK WATER COMPANY, a Corporation, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION, a Public Body,

Defendants.

On Appeal From the Order Granting Summary Judgment of the Superior Court of New Jersey, Law Division, Passaic County

SAT BELOW:

Honorable Herbert S. Alterman

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT, PATERSON MUNICIPAL UTILITIES AUTHORITY

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LEGAL ARGUMENT

POINT I

THE FAILURE OF DEFENDANTS AS PERMITTEES TO PAY FOR THE WATER THEY TAKE CONSTITUTES AN UNLAWFUL TAKING OF PLAINTIFF'S PROPERTY WITHOUT JUST COMPENSATION.

A. THE FAILURE OF THE DEFENDANTS TO PAY PMUA FOR THEIR TAKING VIOLATES BOTH THE UNITED STATES AND NEW JERSEY CONSTITUTIONS.

Article I, Section 20 of the New Jersey Constitution provides in relevant part, as follows: "Private property shall not be taken for public use without just compensation." *N.J.Const.* Art.1, ¶ 20. Similarly, the United States Constitution provides that, "No person shall. . .be deprived of. . .property, without due process of law; nor shall private property be taken for public use, without just compensation." *U.S. Const*, Amendment 5, 14.

For the purpose of this submission, it is not necessary to distinguish between the federal "takings clause" and that promulgated under the New Jersey Constitution. Our Supreme Court has found in its analysis of certain aspects of both promulgations that "our own state constitutional principles governing the taking of property are in general conformity [with the federal constitutional doctrine]." *Gardner v New Jersey Pinelands Comm'n.*, 125 N.J. 193, 205 (1991).

It is clear as set forth below that: (1) the actions of the defendants have constituted a violation of the "Takings Clauses" of both the New Jersey and United States Constitutions, and (2) the trial court erred when it determined that the WSMA, *N.J.S.A.* 58:1A-1, *et seq.* and permits issued to defendants operated to deprive PMUA * * *

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: PASSAIC COUNTY
DOCKET NO. PAS-L-6702-90

CIVIL ACTION

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a Public Body,

Plaintiff,

—vs.—

HACKENSACK WATER COMPANY, a Corporation, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION, a Public Body,

Defendants.

PLAINTIFF PATERSON MUNICIPAL UTILITIES AUTHORITY'S BRIEF IN OPPOSITION TO SUMMARY JUDGMENT MOTION.

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* * *

three such payment agreements by defendants to compensate plaintiff for State permit authorized diversions.

Reading the two operative legislative acts together with the other cited law and constitutional provisions, only one conclusion is clear: while the State does possess a substantial and compelling interest in monitoring the State's water supply and in adopting a system of permits to effectuate its interest, the State does not have the right to deny a person or entity of its rights without just compensation. Such a conclusion is painfully obvious upon a thorough reading of the WSMA and the statutory grant to the NJDWSC to exercise powers at eminent domain.

Such a reading is also required if the act is to pass constitutional muster. If read as defendants allege it would represent an unconstitutional taking without due process. It is designed specifically to adopt a system of permits to enable it to manage the water supply of the State. It does not have the unabashed right to take property without compensating the injured party. "If the language under study admits of two interpretations, one rendering the statute invalid and the other valid, the construction sustaining constitutionality will be adopted." *State v. Monroe*, 30 N.J. 160, 165 (1959). As aptly stated in *State in Interest of R.G.W.*, 145 N.J.Super. 167, 182 (Juv.&Dom.Rel. 1976):

> The spirit of legislative direction prevails over its general terms. *Dvorkin v. Dover Twp.*, 29 N.J. 303, 315 (1959). The fundamental purpose for which the legislation was enacted controls. *New Jersey Builders, etc. Ass'n v. Blair*, 60 N.J. 330, 338 (1972).

Furthermore, all the quoted language in the movant's brief from Senate hearings also confirms that the idea of eliminating "grandfather rights" only dealt with the issue of use or allocation of water. It had absolutely nothing to do with proprietary interests which cannot he abridged without due process.

As to the language in the WSMA which states that "ownership of these assets is in the State as trustee of the people.." (*N.J.S.A.* 58:1A-2), it does not mean that the State has taken everyone's water rights without compensation. That would be unlawful. *U.S.Const.* Amendment V; *N.J.Const.* Art. I, para. 20. Its status is clearly intended as the overseer to allocate these state resources fairly. This is most evident by the language found in the different permits under WSMA, discussed above. It must be noted again, however, that the plaintiff's rights by statute and federal license pre-empt state control under WSMA.

And finally, the statutory provision which provides that if diversion is greater than 100,000 gallons per day a permit must be obtained (*N.J.S.A.* 58:1A-7(a)), contains a specific exclusion:

> Except as provided by section 6 of the act, no person may divert more than 100,000 gallons per day of any waters of the State. . .unless he obtains a diversion permit.

And, section 6 provides in relevant part that in developing the permit system, the department shall:

> *Permit privileges previously allowed pursuant to lawful legislative or administrative action*, except that the department may, after notice and hearing, limit the exercise of these privileges to the extent currently exercised, subject to contract, or reasonably * * *

CONSTITUTION
OF THE
UNITED STATES OF AMERICA

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty , or property, without due process of law; nor shall private property be taken for public use, without just compensation.

58:1A-1. Short title

This act shall be known and may be cited as the "Water Supply Management Act."

L.1981, c. 262, § 1, eff. Aug. 13, 1981.

58:1A-2. Legislative findings and declarations

The Legislature finds and declares that the water resources of the State are public assets of the State held in trust for its citizens and are essential to the health, safety, economic welfare, recreational and aesthetic enjoyment, and general welfare, of the people of New Jersey; that ownership of these assets is in the State as trustee of the people; that because some areas within the State do not have enough water to meet their current needs and provide an adequate margin of safety, the water resources of the State and any water brought into the State must be planned for and managed as a common resource from which the requirements of the several regions and localities in the State shall be met; that the present regulatory system for these water resources is ineffective and counterproductive; that it is necessary to insure that within each basin there exist adequate water supplies to accommodate present and future needs; that to ensure an adequate supply and quality of water for citizens of the State, both present and future, and to protect the natural environment of the waterways of the State, it is necessary that the State, through its Department of Environmental Protection, have the power to manage the water supply by adopting a uniform water diversion permit system and fee schedule, a monitoring, inspection and enforcement program, a program to study and manage the State's water resources and plan for emergencies and future water needs, and regulations to manage the waters of the State during water supply and water quality emergencies.

L.1981. c. 262, § 2, eff. Aug. 13, 1981,

58:1A-3. Definitions

As used in this act:

a. "Commissioner" means the Commissioner of the Department of Environmental Protection[1] or his designated representative;

b "Consumptive use" means any use of water diverted from surface or ground waters other than a nonconsumptive use as defined in this act;

c. "Department" means the Department of Environmental Protection;

d. "Diversion" means the taking or impoundment of water from a river, stream, lake, pond, aquifer, well, other underground source, or other water body, whether or not the water is returned thereto, consumed, made to flow into another stream or basin, or discharged elsewhere;

e. "Nonconsumptive use" means the use of water diverted from surface or ground waters in such a manner that it is returned to the surface or ground water at or near the point from which it was taken without substantial diminution in quantity or substantial impairment of quality;

f. "Person" means any individual, corporation, company, partnership, firm, association, owner or operator of a water supply facility, political subdivision of the State and any state, or interstate agency or Federal agency;

g. "Waters" or "waters of the State" means all surface waters and ground waters in the State.

L.1981, c. 262, § 3, eff. Aug. 13, 1981.

---

[1] Now Department of Environmental Protection and Energy, see Reorganization Plan No. 002-1991, set out under § 13:1D-1.

58:1A-4. State of water emergency; emergency water supply allocation plan; powers of Governor and commissioner; orders; review

a. Upon a finding by the commissioner that there exists or impends a water supply shortage of a dimension which endangers the public health, safety, or welfare in all or any part of the State, the Governor is authorized to proclaim by executive order a state of water emergency. The Governor may limit the applicability of any state of emergency to specific categories of water supplies or to specific areas of the State in which a shortage exists or impends.

b. The department shall, within 180 days of the effective date of this act, adopt an Emergency Water Supply Allocation Plan as a rule and regulation. This plan shall be utilized as the basis for imposing water usage restrictions during a declared state of water emergency and shall include a priority system for the order in which restrictions would be imposed upon the various categories of water usage.

c. During the duration of a state of water emergency the commissioner, to the extent not in conflict with applicable Federal law or regulation but notwithstanding any State or local law or contractual agreement, shall be empowered to:

(1) Order any person to reduce by a specified amount the use of any water supply; to make use of an alternate water supply where possible; to make emergency interconnections between systems; to transfer water from any public or private system; or to cease the use of any water supply;

(2) Order any person engaged in the distribution of any water supply to reduce or increase by a specified amount or to cease the distribution of that water supply; to distribute a specified amount of water to certain users as specified by the commissioner; or to share any water supply with other distributors thereof;

(3) Establish priorities for the distribution of any water supply;

(4) Adopt rules and regulations as are necessary and proper to carry out the purposes of this section; and

(5) Direct any person engaged in the retail distribution of water to impose and collect a surcharge on the cost of that water as a penalty for the violation of any order to reduce water usage issued pursuant to this subsection. The disposition of all sums collected pursuant to this subsection shall be as provided by law; and

(6) Otherwise implement the Emergency Water Supply Allocation Plan adopted pursuant to subsection b. of this section.

58:1A-5. Supply and diversion of water; rules and regulations

The commissioner shall have the power to adopt, enforce, amend or repeal, pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.) rules and regulations to control, conserve, and manage the water supply of the State and the diversions of that water supply to assure the citizens of the State an adequate supply of water under a variety of conditions and to carry out the intent of this act. These rules and regulations may apply throughout the State or in any region thereof and shall provide for the allocation or the reallocation of the waters of the State in such a manner as to provide an adequate quantity and quality of water for the needs of the citizens of the State in the present and in the future and may include, but shall not be limited to:

a. A permit system to allocate or reallocate any or all of the waters of the State, which system shall provide for the issuance of permits to diverters of more than 100,000 gallons per day of the waters of the State, containing at a minimum the conditions required by this act;

b. Standards and procedures to be followed by diverters to ensure that:

(1) Proper methods are used to divert water;

(2) Only the permitted quantity of water is diverted and that the water is only used for its permitted purpose;

(3) The water quality of the water source is maintained and the water standards for the use of the water are met;

(4) The department is provided with adequate and accurate reports regarding the diversion and use of water;

c. Inspection, monitoring, reporting and enforcement procedures necessary to implement and enforce the provisions of this act;

d. Standards and procedures to be followed to determine the location, extent and quality of the water resources of the State and plan for their future use to meet the needs of the citizens of the State;

e. Standards and procedures to be followed to maintain the minimum water levels and flow necessary to provide adequate water quantity and quality;

f. Standards and procedures governing the maintenance of adequate capacity by, and withdrawal limits for, water purveyors.

L.1981, c. 262, § 5, eff. Aug. 13 1981.

58:1A-6. Continuation of existing water diversion permits; persons diverting over 100,000 gallons per day; water usage certification program

a. The department in developing the permit system established by this act shall:

(1) Permit privileges previously allowed pursuant to lawful legislative or administrative action, except that the department may, after notice and hearing, limit the exercise of these privileges to the extent currently exercised, subject to contract, or reasonably required for a demonstrated future need. All diversion permits issued by the Water Policy and Supply Council prior to the effective date of this act shall remain in effect until modified by the department pursuant to this act.

Persons having or claiming a right to divert more than 100,000 gallons of water per day pursuant to prior legislative or administrative action, including persons previously exempted from the requirement to obtain a permit, shall renew that right by applying for a permit, or water usage certification, as the case may be, within 180 days of the effective date of this act. Thereafter, the conditions of the new permit or certification shall be deemed conclusive evidence of such previously allowed privileges.

(2) Require any person diverting 100,000 or more gallons of water per day for agricultural or horticultural purposes to obtain approval of the appropriate county agricultural agent of a 5 year water usage certification program. This approval shall be based on standards and procedures established by the department. This program shall include the right to construct, repair or reconstruct dams or other structures, the right to divert water for irrigation, frost protection, harvesting and other agriculturally-related purposes, and the right to measure the amount of water diverted by means of a log or other appropriate record, and shall be obtained in lieu of any permit which would otherwise be required by this act.

b. Nothing in this act shall prevent the department from including, or requiring the department to include, the presently nonutilized existing privileges in the new or any future diversion permits issued to the present possessors of these privileges, except as otherwise expressly provided in subsection a. of this section.

L.1981, c. 262, § 6, eff. Aug. 13, 1981. Amended by L.1981, c. 277, § 3, eff. Sept. 8, 1981.

* * *

58:1A-8. Contents of permit

Every permit issued pursuant to this act shall include provisions:

a. Fixing the term of the permit;

b. Fixing the maximum allowable diversion, expressed in terms of a daily or monthly diversion;

c. Identifying and limiting the use or uses to which the water may be put;

d. Requiring the diverter to meter the water being diverted and report the amount and quality of the water being diverted;

e. Allowing the department to enter the diverter's facilities or property to inspect and monitor the diversion;

f. Requiring that all water diverted for a nonconsumptive use be returned to a reasonably proximate body of water designated by the department;

g. Allowing the transfer of a permit with the consent of the department, but only for the identical use of the waters by the transferee;

h. Governing the operations and maintenance of the specific facilities, equipment or premises not otherwise established in regulations because of the unique nature of the facilities, equipment or premises;

i. Permitting the department to modify, suspend or terminate the permit, after notice and hearing, for violations of its conditions, this Act, regulations adopted or orders issued by the department, and when deemed necessary for the public interest.

L.1981. c. 262, § 8. eff. Aug. 13, 1981.

* * *

58:1A-11. Administrative fees: diversion permits; disposition

The department shall in accordance with a fee schedule adopted by rule and regulation, establish and charge reasonable administrative fees, which fees shall be based upon, and not exceed, the estimated cost of processing, monitoring, administering and enforcing the diversion permits. The department shall deposit the fees in the "Environmental Ser-

vices Fund" created by P.L.1975, c. 232 (C. 13:1D-30 et seq.). There shall be annually appropriated an amount equivalent to the amount anticipated to be collected as fees by the department for the administration of the water supply management program.

L.1981, c. 262, § 11, eff. Aug. 13, 1981.

58:1A-12. Condemnation for new or additional supply of water; approval by department

No person supplying or proposing to supply water to any other person shall have the power to condemn lands, water or water privileges for any new or additional source of ground or surface water until that person has first submitted to the department an application for approval to divert the source of the water and the department has approved the application subject to such conditions as it may determine to be necessary to protect the public health and welfare.

L.1981, c. 262, § 12, eff. Aug. 13, 1981.

Supreme Court, U.S.
FILED
JAN 17 1995
OFFICE OF THE CLERK

No. 94-1035

In The

Supreme Court of the United States

October Term, 1994

PATERSON MUNICIPAL UTILITIES AUTHORITY,

Petitioner,

v.

HACKENSACK WATER COMPANY, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The New Jersey Supreme Court

BRIEF AND APPENDIX IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a substantial federal question involving an alleged taking of water rights has been presented at all in view of the final and conclusive holdings of the New Jersey courts that, as a matter of state substantive law, the petitioner (1) does not possess property rights in the running waters of the Passaic River at the Great Falls of Paterson "to be held without diminution or alteration", and (2) "does not have greater rights than any other riparian owner to the waters of the Passaic River"?

2. Whether the respondents' mere withdrawal of water from the Passaic River upstream of the petitioner pursuant to water allocation permits validly issued by the State of New Jersey constitutes an act of taking entitling the petitioner to monetary compensation?

3. Whether the petitioner's failure to directly challenge the constitutionality of the New Jersey Water Supply Management Act until it filed its petition for certification before the New Jersey Supreme Court, which was summarily denied without opinion, renders this claim inappropriate for certiorari review?

LIST OF PARTIES

The parties to all of the proceedings below were the petitioner, the Paterson Municipal Utilities Authority, and the respondents, the Hackensack Water Company and the North Jersey District Water Supply Commission. The New Jersey Department of Environmental Protection and Energy,[1] while never a party to the action, appeared as *amicus curiae* in opposition to the petitioner's claims before both the New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court.

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[1] Subsequent to its participation as *amicus*, the agency changed its name to the New Jersey Department of Environmental Protection. It will be hereafter referred to by its present name.

RULE 29.1 STATEMENT

The parent corporation of respondent Hackensack Water Company, a New Jersey corporation, is United Water Resources, Inc. Hackensack Water Company's only subsidiary corporation, Spring Valley Water Company, is wholly owned. Respondent North Jersey District Water Supply Commission, a public authority established pursuant to New Jersey statute, has no parent or subsidiary corporations.

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No. 94-1035

In The

Supreme Court of the United States

October Term, 1994

PATERSON MUNICIPAL UTILITIES AUTHORITY,

Petitioner,

v.

HACKENSACK WATER COMPANY, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The New Jersey Supreme Court

BRIEF IN OPPOSITION

Respondents Hackensack Water Company ("HWC") and the North Jersey District Water Supply Commission ("NJDWSC") respectfully submit that the petition by the Paterson Municipal Utilities Authority ("PMUA") for a writ of certiorari to the New Jersey Supreme Court should be denied.

COUNTER-STATEMENT OF OPINIONS BELOW

In an unreported written opinion dated July 23, 1992, the Law Division of the Superior Court of New Jersey, Passaic County, granted the motion for summary judgment brought by the defendants-respondents HWC and NJDWSC against the plaintiff-petitioner PMUA. Pet. App. 7a-11a. An Order implementing this holding and dismissing with prejudice the PMUA's July 26, 1990 Amended Complaint was entered by the trial court on August 31, 1992. Pet. App. 5a-6a. The Appellate Division of the Superior Court of New Jersey affirmed the grant of summary judgment in an unpublished *per curiam* opinion decided May 2, 1994. Pet. App. 2a-4a. By Order filed September 13, 1994, the New Jersey Supreme Court denied the PMUA's petition for certification without written opinion, and dismissed a companion appeal taken by petitioner on alleged constitutional grounds.[1] Pet. App. 1a. That Order has not yet been reported.

JURISDICTION

Respondents agree that petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) (1988). Respondents disagree that such jurisdiction has been properly invoked. Respondents will seek to establish herein that: (1) there is an adequate and independent

[1] N.J. Ct. R. 2:12-9 instructs that "[t]he denial of certification shall be deemed to be a summary dismissal of the appeal, and the Clerk of the Supreme Court [of New Jersey] shall forthwith enter an order dismissing the appeal, unless the Supreme Court otherwise orders."

state ground for all of the issues assigned as error by petitioner, and (2) petitioner did not raise the alleged unconstitutionality of the New Jersey Water Supply Management Act ("WSMA"), N.J. STAT. ANN. § 58:1A-1 to -17 (West 1992 & West Supp. 1994), in a timely and proper manner with the courts below.

COUNTER-STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V is accurately quoted at Pet. App. 22a but is not directly controlling because neither respondent is an instrumentality of the federal government.[2] The portions of the WSMA reproduced at Pet. App. 23a-30a are not all current.[3]

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[2] However, the NJDWSC (but not HWC) is a public authority of the State of New Jersey, and respondents note that the Fifth Amendment's Takings Clause has been deemed applicable to the states through the Fourteenth Amendment, U.S. CONST. amend. XIV. *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897). *See also* note 14 *infra*.

[3] Sections 3, 6 and 8 of the WSMA, among others, were comprehensively amended in 1993, albeit not in a manner substantially affecting petitioner's constitutional claim. *See* 1993 N.J. Laws, c. 202, §§ 11 (*amending* N.J. STAT. ANN. § 58:1A-3), 1 (*amending* N.J. STAT. ANN. § 58:1A-6), and 4 (*amending* N.J. STAT. ANN. § 58:1A-8), *eff.* July 24, 1993.

COUNTER-STATEMENT OF THE CASE

The opinions of the Law Division of the New Jersey Superior Court granting respondents summary judgment and the Appellate Division affirming that judgment contain an accurate and essentially complete recitation of the facts germane to this petition. *See* Pet. App. 7a-11a; 2a-4a. The New Jersey courts properly held that there has been no taking of the PMUA's property because, as a matter of New Jersey substantive law, the petitioner does not have an underlying property right or interest capable of giving rise to such a claim.

On July 26, 1990, petitioner filed its Amended Complaint in which it claimed to hold the right to "the full use and benefit of the undiminished flow of the Passaic River at the Great Falls area located in Paterson, New Jersey." This water was alleged to be used by the PMUA to generate hydroelectric power. The PMUA claimed to be the successor-in-interest to the City of Paterson, which in turn was the alleged successor to the former Society for Establishing Useful Manufactures ("SUM"). The PMUA *inter alia* alleged a taking of its water, and sought monetary damages from HWC and the NJDWSC due to their diversion of water from the Passaic River and its tributaries upstream of the Great Falls for the provision of potable water to their customers. In so many words, the petitioner claimed an exclusive ownership interest in the entire natural flow of the Passaic River, without diminution, and wanted to be compensated by the respondents for their removal of water from the river before it reaches the petitioner's hydroelectric facility.

HWC is an investor-owned public water utility regulated by the New Jersey Board of Public Utilities ("NJBPU").[4] The NJDWSC is a statutory public authority created "[f]or the purpose of developing, acquiring and operating a water supply or a new or additional water supply for the use of the municipality and such other municipalities as may be authorized to join with it according to [its enabling legislation]." N.J. STAT. ANN. § 58:5-2 (West 1992).[5] Together, both the NJDWSC and HWC own and operate a water diversion and distribution system known as the Wanaque South Project,[6] a joint venture which supplies necessary potable water to hundreds of thousands if not millions of water customers throughout much of northern New Jersey.[7]

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[4] As a public utility, HWC is statutorily required to "furnish safe, adequate and proper service . . . and to maintain its property and equipment in such condition as to enable it to do so." N.J. STAT. ANN. § 48:2-23 (West 1969). The NJBPU is responsible for assuring that its rates are "just and reasonable." *See* N.J. STAT. ANN. §§ 48:2-21 (West 1969); 58:1A-9 (West Supp. 1994).

[5] The NJDWSC develops and operates water resources for specific municipal owners based on projections of need over reasonable periods of time. Although the NJDWSC is not subject to rate-setting oversight by the NJBPU, its enabling legislation contains other safeguards by which its rates are subject to scrutiny. *See* N.J. STAT. ANN. §§ 58:5-9 to -15 (West 1992).

[6] The joint venture was formerly known as the Two Bridges Project.

[7] Without offering any support, petitioner charges respondents with motivation for illicit profit. *See* Pet. Brf. 4, 6 & 9. Even if the presence of a profit motive had any relevance to an alleged unconstitutional taking, the facts obviously do not support the PMUA's accusation. *See also North Jersey Dist. Water Supply Comm'n v. Newark*, 103 N.J. Super. 542, 549, 248 A.2d 249, 252

Operating as the Wanaque South Project, respondents hold valid permits authorizing them to divert water from the Passaic River and other rivers miles upstream from the Great Falls in Paterson, which permits were issued in 1982 by the New Jersey Department of Environmental Protection ("NJDEP") pursuant to the WSMA. These permits are renewals of earlier regulatory approvals whose issuance followed a protracted administrative and court battle waged in the late 1970s and the early 1980s resulting in the reported case of *In Re North Jersey Dist. Water Supply Comm'n*, 175 N.J. Super. 167, 417 A.2d 1095 (N.J. App. Div. 1980), *certif. denied*, 85 N.J. 460, 427 A.2d 559 (1981) ("*In Re N. Jersey*"). In that case, the New Jersey Appellate Division upheld the September 25, 1978 written approval of respondents' application for water allocation by the former state Water Policy and Supply Council ("WPS Council") and the February 23, 1979 administrative Order issued by then-NJDEP Commissioner Daniel J. O'Hern upholding the action of the WPS Council and permitting the respondents, through their upstream water diversion, to encroach on a site included in the New Jersey Register of Historic Places, *i.e.*, the Great Falls of Paterson. *See* 175 N.J. Super. at 188-89, 196-205, 417 A.2d at 1106, 1110-15.

The PMUA's predecessor, the City of Paterson, objected to the WPS Council's approval and Commissioner O'Hern's Order, and it brought the appeal from those

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(N.J. Ch. Div.), *aff'd*, 52 N.J. 134, 244 A.2d 113 (1968) ("It is, of course, clear that the North Jersey District Water Supply Commission is not a private corporation seeking to make a profit").

actions considered in *In Re N. Jersey*. It argued unsuccessfully that the Wanaque South Project would impair the aesthetic appeal of the Great Falls and would result in its loss of potential hydroelectric generating capacity.[8] *Id.* at 187, 417 A.2d at 1105. Commissioner O'Hern's February 23, 1979 Order had concluded that any such impacts would only be minor and in all events did not outweigh the important public water supply needs that had engendered the Wanaque South Project proposal. *Id.* at 189, 417 A. 2d at 1106.

The Appellate Division in *In Re N. Jersey* held that the administrators had properly considered and evaluated all factors for and against the Project and it affirmed their determinations approving it. *See generally id.* at 196-205, 417 A.2d at 1110-15. The court also rejected as premature the City's application for an injunction because of infringement with its alleged water rights since "there [was] no showing, nor [could] there be, that the proposal as preplanned will violate any rights that Paterson has under the [SUM] deed." *Id.* at 183, 417 A.2d at 1103. Even assuming some validity to the City's claims, which the Appellate Division clearly did not, the court instructed that its only possible remedy would be an action for damages and not an injunction. *Id.* This obvious dictum

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[8] Prior to respondents' applications, the former SUM had operated a hydroelectric plant at the Great Falls region for a number of years. However, that facility had been out of service since 1969 and the City of Paterson was only in the process of planning the rehabilitation of the plant when *In Re N. Jersey* was decided. *See* 175 N.J. Super. at 187, 417 A.2d at 1105. The new hydroelectric facility did not actually become operational until several years later.

apparently became the impetus for the damages action that petitioner eventually brought against respondents in 1990.

Following *In Re N. Jersey*, respondents undertook the task of financing and later constructing the massive water diversion, storage and distribution project that their permits allowed. The PMUA also sought approvals for its proposed hydroelectric plant at the Great Falls. On March 11, 1981, some two years *after* Commissioner O'Hern's February 28, 1979 Order, the City of Paterson obtained a license from the Federal Energy Regulatory Commission ("FERC") authorizing rehabilitation of the abandoned SUM plant. That license contained the following language under Article 31:[9]

> This license shall not be construed as affecting in any way the validity of the diversion of water authorized by the order of the New Jersey Commissioner of Environmental Protection dated February 23, 1979, in the proceeding entitled In the Matter of the Application of the North Jersey District Water Supply Commission and the Hackensack Water Company, Amended

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[9] In view of this language, the PMUA's contention that its FERC license preempts all state water law and confers upon it special rights beyond that of a mere riparian owner, *see* Pet. Brf. 5, 10-11, is wrong. *See also First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 175-76, *reh'g denied*, 328 U.S. 879 (1946) (section 27 of the Federal Power Act, 16 U.S.C. § 821 (1988), protects from supersedure state laws involving "proprietary rights" and water rights of the same nature as those relating to the use of water in irrigation or for municipal purposes, although direct intrusions upon federal regulation of hydroelectric power generation may still be preempted).

> Water Supply Application Nos. 1651 and 1685. The licensee's water rights acquired pursuant to State law, not this license shall govern any claim the licensee may advance for damages resulting from any future depletion in the flow of the water of the Passaic River and its tributaries.

On October 10, 1985, almost three years *after* respondents obtained their present WSMA permits, the PMUA also sought and obtained from the NJDEP a WSMA permit authorizing it to divert water at the Great Falls area for the generation of hydroelectric power.[10] The PMUA's permit contained the following language in paragraph 7:

> This permit shall not be construed as affecting in any way the validity of the diversion permits held by other permittees. This permit shall not govern any claim for damages resulting from any future depletion of the flow of the water of the Passaic River and its tributaries asserted by the applicant under claim of water rights acquired pursuant to State law.

Thus, both the petitioner's FERC license and its WSMA permit confirmed that, while it might not be precluded from *seeking* monetary damages because of respondents' previously permitted upstream water diversion, the validity of any such claim would be tested based on the existence or absence of the PMUA's alleged water rights as a matter of New Jersey law and not pursuant to

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[10] Under section 7(a) of the WSMA, petitioner had no choice but to obtain a water diversion permit. As amended by 1993 N.J. Laws, c. 202, § 1, that statute provides that "[n]o person may divert more than 100,000 gallons per day of any waters of the State . . . unless he obtains a diversion permit . . . [pursuant to the WSMA]." N.J. STAT. ANN. § 58:1A-7(a) (West Supp. 1994).

alleged grants contained in the license and permit themselves.

Respondents have never disputed that they divert water upstream of the Great Falls area and thus take water from the Passaic River that might otherwise reach the PMUA's facility via river flow. However, respondents have always maintained that petitioner does not have a cause of action for damages under any theory of relief because it does not have a property interest in the waters of the Passaic River *under New Jersey law* sufficient to sustain such a claim. After a careful evaluation of the various New Jersey statutes and cases cited by the parties below, both the trial court and Appellate Division agreed. They held that petitioner's damages claims must be dismissed because it has no ownership interest in the waters of the Passaic River beyond that of a mere riparian user and, under New Jersey law, this confers no special property rights. *See generally* Pet. App. 7a-11a; 2a-4a. The New Jersey Supreme Court, finding nothing erroneous about the lower courts' conclusions, declined to grant certification. *See* Pet. App. 1a.

It may help to put this matter into perspective to consider the sources that the petitioner identified for its alleged water rights, and why the New Jersey courts held that none of these sources supported the property interest that it claimed. Because the PMUA professed to be the former SUM's successor and argued that the SUM's water rights had originally derived from its legislative charter, *see* Pet. App. 8a, the state courts first examined that charter to determine if it contained a legislative delegation of water rights. They found that it did not.

The SUM was created in 1791 by an enabling act of the New Jersey Legislature: literally, the 18th Century equivalent of modern day articles of incorporation. *See* Act of November 22, 1791, Pat. 104, 1791 N.J. Laws 108 ("1791 Act"). Under its charter, the SUM was organized for the purpose of "carrying on the business of manufactures." *Id.*, § 1. Among other things, the 1791 Act empowered the SUM to purchase and hold property, to cut canals, and to collect tolls for the passage of vessels on any canals that it might build. *Id.*, §§ 1, 17 and 20. However, contrary to the PMUA's assertions, nowhere within the 1791 Act was there any so-called legislative grant to the SUM of exclusive rights to the "full use and benefit of the undiminished flow of the Passaic River." *See generally id.*, §§ 1 to 38. This determination was explicitly reached by the New Jersey trial court, which noted that a series of early 19th Century cases upon which petitioner had relied to interpret the Act stood only for the proposition that the SUM possessed the common law rights of a riparian owner. *See* Pet. App. 8a. The trial court's conclusion was later restated and affirmed by the Appellate Division in denying the PMUA's appeal. *See id.* at 3a.

The PMUA also argued that these same early 19th Century cases supported its position that the SUM's water rights included the exclusive right to the running water of the Passaic River without "diminution or alteration." *See* Pet. App. 8a. The cases that it cited included *Society for Establishing Useful Manufactures v. Low*, 17 N.J. Eq. 19 (N.J. Ch. 1864), *Society for Establishing Useful Manufactures v. Morris Canal & Banking Co.*, 1 N.J. Eq. 157 (N.J. Ch. 1830), and *Between the Society for Establishing Useful*

Manufactures and Morris Canal and Banking Co., 30 N.J. Eq. 145 n. (1829). However, as the lower courts held, all of these cases described nothing more than the old English "natural flow" theory of riparian doctrine that had apparently been the common law in New Jersey a century and a half ago. *See* Pet. App. 9a; *cf.* Pet. App. 3a.

Respondents showed and the trial court agreed that the English "natural flow" theory has not been the common law in New Jersey since at least 1956, and probably much earlier,[11] when New Jersey formally announced adherence to the more modern American or "reasonable use" doctrine in such cases as *Armstrong v. Francis Corp.*, 20 N.J. 320, 120 A.2d 4 (1956), and *Borough of Westville v. Whitney Home Builders, Inc.*, 40 N.J. Super. 62, 122 A.2d 233 (N.J. App. Div. 1956). *See* Pet. App. 9a-10a.[12] The trial court also noted that when the New Jersey Legislature

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[11] Petitioner's continued citation to early 19th Century riparian cases, *see* Pet. Brf. 9 n. 4, 10 & n. 6, fails to acknowledge this point entirely.

[12] Under the old English rule, riparian owners were entitled to water absolutely undiminished in quantity and quality. *See* Lechner, *Riparian Rights to Water Quality*, 6 SETON HALL LEGIS. J. 339, 340 (1983). However, it has been recognized that application of this doctrine "severely limits the consumptive uses that may be made of the water since virtually any consumptive use will diminish the quantity or quality of the water available to other users downstream." 5A POWELL ON REAL PROPERTY, ¶ 713[4][a], at 65-75 (1991). As a result, the "natural flow" doctrine has been abandoned by most riparian jurisdictions. *Id.*, at 65-77. By contrast, the majority of riparian states now follow the less restrictive American view (or "reasonable use" theory), which permits each riparian proprietor to use "water for any lawful purpose so long as the use is reasonable and does not unreasonably interfere with the legitimate uses and needs of other proprietors on the stream." *Id.*, ¶ 713[4][b], at 65-77.

adopted the Water Supply Management Act in 1981, it specifically found that the "water resources of the state are public assets of the state held in trust for its citizens," "that ownership of these assets is in the state," and that adoption of the WSMA was necessary to insure adequate water supplies. Pet App. 10a, *quoting from* N.J. STAT. ANN. § 58:1A-2 (West 1992).[13] Therefore, petitioner's claim to exclusive ownership of the Passaic River waters was clearly not recognized by any pertinent, present-day New Jersey authority.

In affirming the trial court's grant of summary judgment, the Appellate Division placed strong reliance on its earlier decision in *Johns-Manville Sales Corp. v. New Jersey Water Supply Auth.*, 211 N.J. Super. 315, 511 A.2d 1194 (N.J. App. Div. 1986). *See* Pet. App. 3a. In that case, the court upheld the validity of a regulation that imposed water diversion charges on a riparian property owner who had been diverting water from an adjacent river for decades prior to the enactment of the regulation. The court rejected the riparian owner's takings claim, holding that:

> Manville's principal contention is that none of those statutes allows the Authority to charge a riparian owner for the exercise of its common law right to divert water from its natural flow. We find no merit in that contention. *Manville does not own the water flowing by its property. That water is publicly owned.* . . .

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[13] Absent a valid legislative grant, which the 1791 Act was not, New Jersey's claim to public ownership of the State's running waters is an ancient and well-recognized doctrine. *See, e.g., Cobb v. Davenport*, 32 N.J.L. 369, 378 (N.J. Sup.Ct. 1867); *Arnold v. Mundy*, 6 N.J.L. 1, 71-78 (N.J. Sup.Ct. 1821).

* * *

> The riparian owner is limited to a "reasonable use" of the waters of a stream or water course abutting his property; what constitutes reasonable use is "a question of fact to be determined in each case upon a consideration of all the relevant circumstances." *Armstrong v. Francis Corp.*, 20 *N.J.* 320, 330[, 120 A.2d 4](1956). *Thus the fact that Manville drew a certain volume of water from the river at one point in time does not confer on it any "right" to continue to do so.*
>
> * * *
>
> For substantially the same reasons, we also find without merit Manville's alternative contention that the effect of [the regulation] is to take its private property without just compensation. *The water resources are publicly owned and subject to State regulation; the State's action in allocating those resources does not invade any constitutionally protected interests* of Manville. *Cf. Reingold v. Harper*, 6 *N.J.* 182, 193-95[, 78 A.2d 54] (1951).

Id. at 318, 320-21, 511 A.2d at 1195-1196, 1197 (emphasis added; citations omitted).

Petitioner appears to read more into the rights of a riparian owner than exists under New Jersey law. That State's common law has never held that a riparian holder has an absolute ownership interest in water flowing on its land. Instead, the common law recognized that:

> in view of the transient and flowing nature of water, the landowner's property therein is not absolute, but qualified. In a sense he owns it while it is upon his land, but *his ownership is limited to a usufructuary interest.* . . .

McCarter v. Hudson County Water Co., 70 N.J. Eq. 695, 708, 65 A. 489, 494 (E. & A. 1906), *aff'd*, 209 U.S. 349 (1908) (emphasis added). A usufruct is:

> defined as "the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing." . . . Importantly, however, it is in the nature of a right to make use of water only; and the right itself does not represent an ownership interest in the actual corpus of water until the water is reduced to possession.

5A POWELL ON REAL PROPERTY, *supra*, ¶ 710[3][a], at 65-36 (citations omitted).

Consequently, the New Jersey courts properly held that under that State's substantive law the PMUA has no property interest in the waters of the Passaic River entitling it to maintain a takings claim against respondents.

REASONS FOR DENYING THE WRIT – SUMMARY OF ARGUMENT

Petitioner advances two reasons for granting the writ: (1) this case presents an important issue of federal constitutional law which has not been, but should be, settled; and (2) the state courts decided this action in a manner that conflicts with applicable decisions of this Court. Pet. Brf. 6. However, in its zeal to fabricate a basis for review, petitioner ignores the most fundamental aspect of the state court opinions that it asserts were in error: That is, none of those decisions turned in any way

on (or even discussed) petitioner's federal constitutional claims, nor did they address at all the several opinions of this Court that petitioner now maintains are in conflict with the opinions below.

Of course, petitioner would have this Court believe that the New Jersey courts' failure to consider these issues constitutes egregious error. However, the real reason these issues were not addressed is much simpler: The state courts recognized that this litigation could be fully resolved within the scope of New Jersey substantive property law. The New Jersey courts must have realized that any federal constitutional claims raised by the PMUA were not integral to their analysis at all, and it was not necessary to look beyond the substantive law of New Jersey to address the various opinions of this Court that petitioner cited.

Accordingly, respondents respectfully submit that the reasons for denying the writ are really two, both of which stem from the essential jurisdictional requirement of 28 U.S.C. § 1257(a) that a substantial federal question must have been properly raised and considered in the state court proceedings: (1) the lower courts' opinions rest on independent and adequate state law grounds, *i.e.*, that the PMUA does not have a property interest in the waters of the Passaic River capable of being taken; and (2) petitioner failed to raise a direct challenge to the constitutionality of the WSMA until it sought review before the New Jersey Supreme Court, thus precluding meaningful and timely review of this claim.[14] As it happens, there is

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[14] A third reason to deny certiorari may exist solely with respect to HWC. Although a New Jersey public utility, HWC is a

no issue of constitutional dimension presented by the determinations below at all, nor is there any conflict between the New Jersey opinions and other decisions of this Court. Therefore, the writ of certiorari should be denied because no "special and important reasons" have been presented for its issuance. SUP. CT. R. 10.1.

A. THE JUDGMENT BELOW RESTS ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS: THE NEW JERSEY COURTS PROPERLY HELD AS A MATTER OF STATE LAW THAT THE PETITIONER DOES NOT POSSESS ANY PROPERTY INTEREST IN THE WATERS OF THE PASSAIC RIVER CAPABLE OF BEING TAKEN

It is well-established that this Court lacks jurisdiction to review a state court judgment where there exists "independent and adequate" state grounds to support the judgment. *Black v. Cutter Labs*, 351 U.S. 292, 298 (1956); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). The basis for this limitation is "the partitioning of power between the state and federal judicial systems and in the limitations of [this Court's] own jurisdiction. [This Court's] only power over state judgments is to correct them to the

---

private corporation and, other than via state regulation and through its joint venture relationship with the NJDWSC, has no affiliation with the State of New Jersey. Therefore, a substantial issue exists of whether, and if so how, HWC's actions can translate as a "public use" under the Fifth Amendment's Takings Clause or may otherwise meet the requirements of "state action" necessary to invoke the Fourteenth Amendment. *Cf. Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

As this Court has recognized, "the first step [in takings analysis] is to identify a property . . . interest entitled" to constitutional protection. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260 (1987). *Accord, Vitek v. Jones*, 445 U.S. 480, 487 (1980). However,

> [p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as state law* – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (emphasis added). Accordingly, in *United States v. Rodgers*, 461 U.S. 677, 683 (1983), this Court recognized that the "definition of underlying property interests is left to state law," while the "consequences that attach to those interests [that in fact exist] is a matter left to federal law."

In this matter, there is no question that the New Jersey state courts fully considered all of petitioner's arguments and properly found that they lacked merit *as a matter of New Jersey state law*. After finding that the trial court had correctly determined that neither the 1791 Act "nor any succeeding statutory or decisional law" supported the PMUA's claim, and that it "does not have greater rights than any other riparian owner to the waters of the Passaic River," the Appellate Division held:

> *These holdings are dispositive of the appeal.* PMUA stated its cause of action as one for a

> taking of its property without compensation. PMUA did not, and does not, contend that the State's allocation of water is unreasonable. . . .

Pet. App. 3a-4a (emphasis added). Plainly, no issue of federal dimension was even necessary to be addressed because the analysis turned exclusively upon New Jersey's substantive law.

The appropriateness of denying certiorari in these circumstances is confirmed by this Court's recent decision to deny certiorari in *Stevens v. City of Cannon Beach*, ___ U.S. ___, 114 S. Ct. 1332 (1994) ("*Stevens*"). The petitioners in *Stevens* were owners of vacant lots in a dry sand area of the City of Cannon Beach, Oregon. They brought an inverse condemnation action, alleging that the denial of permit applications to construct sea walls on their land constituted an unconstitutional taking. The Oregon state courts denied the petitioners' claim on the ground that their property interests did not include the right to interfere with the public's right to use the dry sand area as recognized by the Oregon Supreme Court in the decision of *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969) ("*Thornton*"). *See Stevens v. City of Cannon Beach*, 114 Or. App. 457, 835 P.2d 940, 941 (1992), *aff'd*, 317 Or. 131, 854 P.2d 449 (1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1332 (1994). This Court denied petitioners' petition for certiorari over the dissent of Justices Scalia and O'Connor. 114 S. Ct. at 1332. The instant case raises even stronger independent and adequate state grounds for denying a writ than did *Stevens*.[15]

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[15] In Stevens, the dissenters raised concerns about the denial because, in their view, the Oregon Court of Appeals had

All of the prior decisions of this Court relied upon by the PMUA are inapposite because the takings analysis in those cases presupposed the existence of a property interest subject to constitutional protection. In each of those decisions, the sole issue before this Court was whether the government's alleged interference with the claimant's *existing* property right was of sufficient dimension and scope to constitute a taking. The threshold issue of whether the claimant held a property interest was simply not at issue, being either self-evident or not raised before this Court.

Hence, in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994), this Court was called upon to address the issue of whether a city's requirement that a landowner dedicate a portion of her property within a flood plain for the improvement of a storm drainage system and adjacent property for a bicycle/pedestrian pathway as a condition for a building permit approval amounted to a regulatory taking. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court considered whether a New York law requiring a property owner to permit the permanent installation of cable facilities on its property constituted a physical taking. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court considered

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misinterpreted the *Thornton* opinion and thus relied upon "non-existent rules of state substantive law." *Id.* at 1334. The present petition does not raise any similar concerns. As previously noted, all of the New Jersey state court holdings were well-founded and consistent with established state law. Significantly, petitioner has failed to cite to a single, modern New Jersey authority to show that the state courts' resolution of their own property law was erroneous.

whether a governmental regulation requiring public access to a private marina amounted to a taking. In the course of finding that the regulation was a taking, the Court acknowledged that "what petitioners now have is a body of water that was private property under Hawaiian law." *Id.* at 179. In *Dugan v. Rank*, 372 U.S. 609 (1963), this Court did not address whether a property interest existed but, instead, apparently assumed the plaintiff's right "to the full natural flow" of the river at issue which the riparian owner held under the archaic "natural flow" theory followed by California common law at the time. *See id.* at 615-16, 620, 623-24. And in *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950), this Court addressed the issue of whether the government's actions in constructing a dam which continuously maintained the level of the Mississippi River soaking the plaintiff's land and destroying its agricultural value constituted a taking.

In *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886 (1992), this Court addressed the issue of whether a state law prohibiting a beachfront owner from constructing single family homes on its property constituted a taking. The Court did address the threshold issue of whether a property interest existed – which had not been considered by the courts below – and stated that:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation *only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.*

112 S. Ct. at 2899 (emphasis added). The Court further stated that whether such a limitation existed was an issue of "state law to be dealt with on remand." *Id.* at 2901.[16]

In sum, petitioner's complaint was dismissed by the New Jersey courts because it does not have a property interest under state law entitling it to anything more than the right to the "reasonable use" of the waters of the Passaic River as a riparian user. It does not own the water in the river – the State of New Jersey does – and respondents have been authorized by the State to divert the water that they take via permits duly issued under the WSMA. There being clearly adequate and independent state law grounds for dismissal of the PMUA's takings claim, there is no jurisdictional basis for this Court to grant a writ of certiorari and the request should be denied.

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[16] Petitioner also relies upon *North Carolina v. Hudson*, 665 F. Supp. 428 (E.D.N.C. 1987). That decision is likewise inapposite. In *Hudson*, the issue before the court involved a challenge to the United States Army Corp of Engineers' authority to issue permits to a municipality to construct a water intake structure. Although the court commented upon the status of North Carolina riparian law, it rejected the plaintiffs' assertion of a takings claim on the ground that the issuance of the permits would not give rise to a compensable claim. In this regard, the court expressly held that "[i]ssuance of the permit confers no property rights" and that "[r]iparian doctrine is simply not relevant to the permit application consideration." *Id.* at 447-48.

B. THE PETITIONER'S FAILURE TO DIRECTLY CHALLENGE THE CONSTITUTIONALITY OF THE NEW JERSEY WATER SUPPLY MANAGEMENT ACT UNTIL IT FILED ITS PETITION FOR CERTIFICATION BEFORE THE NEW JERSEY SUPREME COURT RENDERS THIS CLAIM INAPPROPRIATE FOR CERTIORARI REVIEW

Petitioner also requests this Court's review to assess the constitutionality of the WSMA. It asserts:

> [I]f the WSMA declares state ownership of property previously purchased by others and permits the taking of property without compensation as presently held in this matter, the statute is unconstitutional as applied.

Pet. Brf. 10. Although this assertion provides no ground for review not already subsumed by the lower courts' adequate and independent state law analysis, an alternative basis exists for denying the PMUA's request to review the WSMA's constitutionality specifically: The petitioner never sought to directly challenge the constitutionality of the WSMA until it filed its petition for certification with the New Jersey Supreme Court. Having failed to raise this issue in a proper or timely fashion for consideration by the inferior New Jersey courts, petitioner should not be permitted to argue this issue, on the merits, for essentially the first time before this Court.

The PMUA did, of course, argue before the trial court and the Appellate Division that the respondents' diversion of waters from the Passaic River constitutes an unconstitutional taking. *See, e.g.*, Pet. App. 19a-21a;

15a-18a. Petitioner also asserted before these courts variously that: (1) the WSMA should be read in a manner so as not to preclude its takings claim against the respondents; (2) the WSMA and the 1791 Act should be read *in pari materia*; (3) petitioner's FERC license and other alleged existing rights preempt state control under the WSMA; and (4) the State of New Jersey never took petitioner's alleged water rights by virtue of adoption of the WSMA. *See generally id.* However, petitioner never asserted a *direct* challenge to the constitutionality of the WSMA until it sought a grant of certification by the New Jersey Supreme Court. *See* Pet. App. 12a-14a.[17]

In fact, the PMUA affirmatively represented to both the trial court and the Appellate Division that it was *not* challenging the legality, much less the constitutionality, of the WSMA but, rather, was merely seeking compensation *from the respondents* because of *their* diversion of water from the Passaic River. In opposition to respondents' motion for summary judgment in the trial court, the PMUA stated that it did "not take issue with the [State's] granting of the water diversion permits" to respondents and that "neither the adoption of the WSMA nor the State's issuance of the permits to the defendants has caused this plaintiff to suffer damages." Res. App. 2a. In oral argument before the trial court, petitioner's attorney asserted:

> The state of New Jersey passed a regulation. We accept it. It's been ruled upon. They [the State]

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[17] The PMUA's footnote 3 is not to the contrary. *See* Pet. Brf. 5-6, n. 3.

> have the right under the Management Act to say, "They can take that water."

Res. App. 4a-5a.

In the Appellate Division, the PMUA represented to the court that:

> The defendants misunderstand (or choose to misstate) plaintiff's position. . . . Plaintiff *does not* take issue here with the validity or scope of the water diversion permits issued to defendants. . . . Stated otherwise, plaintiff takes no issue with the ability of the WSMA to grant permits to others to divert a certain quantity of water at the Great Falls. . . .

Res. App. 8a (emphasis original). Based upon these representations, the Appellate Division noted that the "PMUA stated its cause of action as one for a taking of its property without just compensation" and that the "PMUA did not, and does not, contend that the State's allocation of water [pursuant to the WSMA] is unreasonable." Pet. App. 3a-4a.[18]

This Court has held it to be a jurisdictional prerequisite that constitutional claims be asserted below, and that review of claims not raised below will not be granted. *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). *See also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n. 16 (1983) ("[b]y failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court").

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[18] Giving petitioner the benefit of the doubt, its position before the trial court and the Appellate Division was at the very least confusing, if not inconsistent.

Furthermore, merely raising a constitutional claim abstractly before a state court is not sufficient to preserve it. It must be raised, presented and pursued in a proper and timely manner at the appropriate point in the state court proceedings. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919).

Here, where petitioner's belated direct challenge to the WSMA's constitutionality only *first* occurred before the state Supreme Court – which obviously did not pass upon the merits because it declined to grant petitioner's application for certification – petitioner has not met this standard. When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

Under these circumstances, the Court should deny the PMUA's certiorari request challenging the constitutionality of the WSMA as untimely and having been improperly presented to the state courts for resolution.

CONCLUSION

For the reasons set forth above, the PMUA's petition for a writ of certiorari directed to the New Jersey Supreme Court should be denied. Petitioner has failed to present any special or important reasons for this Court's review.

MARTY M. JUDGE
DRINKER, BIDDLE & REATH
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(609) 921-6336

Attorneys for Respondents

Dated: January 11, 1995

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: PASSAIC COUNTY
Docket No. PAS-L-6702-90
Civil Action

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a Public Body,

Plaintiff,

-vs.-

HACKENSACK WATER COMPANY, a Corporation,
and NORTH JERSEY DISTRICT WATER SUPPLY
COMMISSION, a Public Body,

Defendants.

PLAINTIFF PATERSON MUNICIPAL UTILITIES AUTHORITY'S BRIEF IN OPPOSITION TO SUMMARY JUDGMENT MOTION

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* * *

It cannot be presumed that enactment of the WSMA repealed the legislation which established the S.U.M. and

granted various rights to it. This is certain where both acts can be read in *pari materia.*

The purpose of the WSMA was to enable the State to " . . . manage the water supply by adopting a uniform water diversion permit system . . . " *N.J.S.A.* 58:1A-2. The plaintiff here does not take issue with the granting of the water diversion permit to these defendants. That was litigated in the agencies and confirmed by the Appellate Division in *In Re North Jersey Dist. Water Supply Comm'n,* 175 N.J. Super. 167 (App. Div. 1980), *cert. den.,* 85 N.J. 460 (1981). What it does object to, however, is that the use does deprive the plaintiff of its rights, and it should therefore be compensated for the rights which it has lost. Contrary to the movant's assertion, the PMUA does not claim it is entitled to "receive a fixed quantity of water flow in the Passaic River in perpetuity, to the exclusion of all other water users . . . " What it does claim is that if other users divert, that they must compensate the plaintiff for the damages the diversion has caused or will cause.

* * *

POINT IV

THE DAMAGE SUFFERED BY THE PLAINTIFF WAS CAUSED BY THE DEFENDANTS AND NOT THE STATE

As has been demonstrated throughout this Brief, neither the adoption of the WSMA nor the State's issuance of the permits to the defendants has caused this plaintiff to suffer damages. The movants have conjured up a straw man argument that it is the State who is responsible for

the damages suffered by the PMUA. This position is wholly without merit. Neither the WSMA nor the permits issued to the defendants deny the plaintiff its right to recover damages as a result of the diversion by the defendants.

It is neither the State nor the DEPE, pursuant to the WSMA, which receives a benefit as a result of the defendants' diversion. The defendants, not the State of New Jersey, sell and profit by their use of the water being diverted. Their profit and resultant unjust enrichment, is at the expense of the plaintiff.

* * *

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-CIVIL PART
PASSAIC COUNTY
DOCKET NO. PAS-L-6702-90

PATERSON MUNICIPAL UTILITIES AUTHORITY

Plaintiff,

-v-

HACKENSACK WATER COMPANY and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION

Defendants.

TRANSCRIPT OF ORAL ARGUMENT ON MOTION FOR SUMMARY JUDGMENT

PLACE: Passaic County Superior Court
77 Hamilton Street
Paterson, New Jersey
DATE: July 2, 1992

BEFORE:

THE HONORABLE HERBERT S. ALTERMAN, J.S.C.

TRANSCRIPT ORDERED BY:

JOANNE L. GRAF, ESQUIRE

(Stern, Steiger, Croland, Tanenbaum and Schielke)

APPEARANCES BY:

BRUCE ACKERMAN, ESQUIRE
(Stern, Steiger, Croland, Tanenbaum and Schielke)
On Behalf of the Plaintiff.

MARTY M. JUDGE, ESQUIRE
(Stryker, Tams and Dill)
On Behalf of the Defendant.

Proceedings recorded by electronic sound recording, transcript produced by transcript service.

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* * *

[MR. ACKERMAN:] The U.S. Supreme Court said to the contrary. First of all, it is a taking. De minimis or insubstantial is not the issue. A taking is a taking, it has to be fairly compensated for. And in the *Lorretto* opinion it referred to *Kaiser Aetna versus United States* and stated, "The holding of that court as the government's imposition of a navigational servitude, which was an easement across waters, requiring public access to a pond was a taking where the land owner had reasonably relied on the government's consent in connecting the pond to navigable water."

It went on to hold that even if the government physically invades only an easement in property it must nonetheless pay compensation.

Now, Mr. Judge has tried to say we should be suing the state of New Jersey. But the state of New Jersey didn't get any benefit from something we've lost. The state of New Jersey passed a regulation. We accept it. It's been

ruled upon. They have the right under the Management Act to say, "They can take that water."

But that's not to say that just because they got an authorization to take it, that we have to sue the state. The state didn't take it from us. The state doesn't get the benefit from it. If the state did take it, and said, "We're taking the water and we're using it," we would be suing the state. And I think under the U.S. Supreme Court line of cases . . . .

* * *

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-487-92T1
Civil Action

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a Public Body,

Plaintiff,

-vs.-

HACKENSACK WATER COMPANY, a Corporation, and
NORTH JERSEY DISTRICT WATER SUPPLY
COMMISSION, a Public Body,

Defendants.

On Appeal From the Order Granting Summary
Judgment of the Superior Court of
New Jersey, Law Division
Passaic County

SAT BELOW:

Honorable Herbert S. Alterman

REPLY BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF/APPELLANT PATERSON MUNICIPAL UTILITIES AUTHORITY

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* * *

The defendants misunderstand (or choose to misstate) plaintiff's position. Plaintiff *does not* maintain (as the defendants erroneously state in their brief) that it has the absolute right to divert a certain quantity of water *ad infinitum*, because its predecessors have done so. Db39. Plaintiff *does not* take issue here with the validity or scope of the water diversion permits issued to defendants. The latter was the main issue litigated in *In Re North Jersey Dist. Water Supply Comm'n*, 175 N.J. Super. 167 (App. Div. 1980), *cert. den.*, 85 N.J. 460 (1981).

However, plaintiff does object to the defendants' diversion under permit depriving plaintiff of its lawful rights as a property owner and causing plaintiff to suffer tremendous damage without compensation. Stated otherwise, plaintiff takes no issue with the ability of WSMA to grant permits to others to divert a certain quantity of water at the Great Falls. . . .

* * *